No. 93-1199

In the Supreme Court of the United States

OCTOBER TERM, 1994

MARVIN STONE, PETITIONER

v.

IMMIGRATION & NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

A. The Attorney General's Definition Of "Final Order Of Deportation" Is Not Dispositive

The Immigration & Naturalization Service ("INS") has invoked the decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) to oppose circuit court jurisdiction of a petition filed within the statutory period after action on a motion to reopen. (Br. 18)

Deference to the Attorney General's definition of final, for the purpose of judicial review, is not warranted when there is a pending motion to reopen or reconsider. Congress has not defined when a deportation order is final. Congress also has not expressed its opinion on the issue of tolling the time period for judicial

review of deportation orders, although there have been several revisions of the Immigration and Nationality Act ("INA") in the 29 years that tolling has been part of our jurisprudence in the judicial review of deportation proceedings. Thus, it is the province of this Court to state what the law is.

Although the Attorney General has defined "final order of deportation" for her purposes, that does not require this Court to defer to it for the purpose of federal jurisdiction.

As the INS noted, the introduction to this regulation at 26 Fed. Reg. 12,113 (1961) explains that the definition of "final order of deportation" at 8 C.F.R. 243.1 "is new." (Br. 15) It appears that there was no notice and comment period for

this particular regulation.[1] Thus, it may be accorded less deference.[2]

Our Courts do have some interest in when matters will come before them from an agency, particularly when the agency is attempting to define or expand jurisdiction. "The fact that construction of the statutory term directly impacts such jurisdictional determinations should, in our view, be factored into a proper analysis of the statutory issue we face." *American Civil Liberties Union v. F.C.C.*, 823 F.2d 1554, 1567 (1987). "[A]n agency ruling that broadens its own jurisdiction

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[1] The relevant introduction in the December 19, 1961 Federal Register does refer to a notice of proposed rulemaking, regarding the INA, at 26 Fed. Reg. 9858 (October 20, 1961), where a 20 day comment period was given. However, those proposed regulations did not contain an equivalent to sec. 243.1.

[2] Indeed, the regulations themselves have never expressly dictated when a petition for review should be filed.

is examined carefully." *Hi-Craft Clothing Co. v. N.L.R.B.*, 660 F.2d 910 (CA3 1981) In this case, the agency is attempting to restrict the Court's ability to review very significant decisions that have been fully developed through administrative reconsideration or reopening. In the course of doing so, the agency may also be increasing the number of filings in circuit court, or prolonging actions in those courts. (Pet. Br. 22-25, 41) This too, gives this Court reason to reject deference.

The filing of a motion to reopen or reconsider does deprive a BIA order of some aspects of finality in all instances, and will deprive a BIA order of all aspects of finality in some instances. A final ruling should end litigation on the merits. *FirstTier Mortgage Co. v. Investors*

Mortgage Ins. Co., 498 U.S. 269, 273 (1991). The mere filing of a motion to reopen or reconsider prolongs litigation on the merits. It means that the BIA opinion and order is in jeopardy, and thus not a "definitive position" referred to in *Darby v. Cisneros*, 113 S. Ct. 2359, 2543 (1993).[3]

While the Attorney General has defined "final order of deportation," "[a]n agency's determination of finality is not necessarily decisive." *Carter/Mondale Presidential Committee v. F.E.C.*, 711 F.2d 279, 288 (1983). However, a "realistic assessment of the nature and effect of the

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[3] "Petitions to reopen, like motions for rehearing or reconsideration, are, as the Immigration Service urged in Foti, 'intimately and immediately associated' with the final orders they seek to challenge." Cheng Fan Kwok v. Immigration Service, 392 U.S. 206, 217, citing brief for Respondent, No. 28, October term 1963, at 53.

order" is relevant. *Fidelity Television v. F.C.C.*, 502 F.2d 443, 448 (1974).

One "effect" of a BIA order is that the INS may execute deportation "no sooner than 72 hours after service of the decision." 8 C.F.R. 243.3(b). The INS points to the longstanding regulation that allows deportation upon BIA order, despite a pending motion to reopen. (Br. 15) While there is no *automatic* stay of deportation, the BIA is indeed empowered to grant a stay. 8 CFR 3.8(a) The INS may also grant a stay, 8 C.F.R. 243.4, and it is INS policy that, when a motion to reopen is filed, "a brief memorandum *shall* be prepared by the district director indicating whether deportation will be stayed while the motion is being considered by the Board ...." [emphasis added] Immigration & Naturalization Service Operations Instruction 3.1 (g).

The decision in *Weinberger v. Salfi*, 422 U.S. 749, 766, (1975), should not compel deference for the purpose of circuit court jurisdiction. (Br. 19, 34) In *Salfi*, the Court was concerned with whether the litigants had reached a "final decision" enabling judicial review. Again, the Court held that exhaustion of the *full range* of administrative remedies was not *required* to reach the threshold for judicial review. Since the term "final decision" was not defined by Congress in Title 42, the Court could defer the agency's determination "*in particular cases* that full exhaustion of internal review procedures is not necessary." 422 U.S. at 767. (emphasis added)[4]

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[4] The exhaustion requirement was not challenged by the parties in *Weinberger v. Salfi*, 422 U.S. at 767. The Court had noted that "on their face" the steps taken by the parties had "fall[en] short of meeting" the statutory and regulatory specifications for

This Court has referred to a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). To prevent a non-citizen from electing completion of a motion to reopen before seeking judicial review would be arbitrary, capricious, and, as noted below, contrary to the Immigration & Nationality Act.

B. The Text, Structure, And Background Of The INA Shows That Tolling The Time Period For Judicial Review Is Favored By The INA.

1. *The 1961 Enactment of 8 U.S.C. 1105a*

The INS points to the difference in statutory language regarding the deadline for filing a petition for review between 8

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finality. *Id.* at 765.

U.S.C. 1105a ("INA 106(a)") and the Hobbs Act (Br. 23-24, 35). The Hobbs Act, at 28 U.S.C. 2344, states that a party "may, within 60 days after its entry, file a petition to review the order in the court of appeals." The "may" language in the Hobbs Act is not so "permissive" as to relieve parties of the 60 day requirement. *Microwave Communications, Inc. v. FCC*, 515 F.2d 385. The "may" language simply means such a motion is not necessary for exhaustion of administrative remedies. Thus, it cannot be inferred that INA 106(a) is designed to be more strict than the Hobbs Act.

The Court below, as well as the INS, points to the Act of September 26, 1961, Pub. L. No. 87-301, for support. *Stone v. INS*, 13 F.3d at 936-37 (Br. 22-24) However, this Court noted on several

occasions that the legislation was designed to limit repetitive or prolonged judicial review. This is distinct from prolonged administrative action, or delayed judicial review. "The fundamental purpose of section 106 (a) was to abbreviate the *process of judicial review* of deportation orders in order to frustrate ... dilatory tactics ...." *Foti v. Immigration Service*, 375 U.S. 217, 287 (1963) [emphasis added] The Court cited the House report which was disturbed with the "frequency of *judicial actions* being instituted by undesirable aliens ..." Ibid. [emphasis added][5]

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[5] H.R. Rep. No. 1086, 87th Cong, 1st Sess. 22-23 (1961), *reprinted in* 1961 U.S. Code Cong. & Ad. News 2967. The report states that the new exhaustion of administrative remedies requirement was added in order to "curtail, if not eliminate repetitious and unjustified appeals to courts." *Id.* at 2971. Nonetheless, the report shows that Congress wants aliens to have access to the Courts "[s]ince deportation proceedings deal with the liberty of persons rather than mere

Petitioner maintains that the approach of the 9th, 11th, 5th, and D.C. circuits --- those that allow tolling --- is a framework for less activity in the Circuit Courts. (Pet. Br. 22-25) Indeed, this Court found a Ninth Circuit interpretation of INA 106(a) "persuasive" in *Cheng Fan Kwok v. Immigration Service*, 392 U.S. 206, 215 (1968) (Harlan, J), citing *Yamada v. Immigration & Naturalization Service*, 384 F.2d 214, 218. "Congress visualized a *single* administrative proceeding in which all questions relating to an alien's deportation would be raised and resolved, followed by a *single* petition in a court of appeals for judicial review ...." *Ibid.* [emphasis added] Nearly twenty years later, the Ninth Circuit reaffirmed its belief that the "tolling of the limitations

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property ...." *Id.* at 2973.

period can be explained in terms of the congressional purpose underlying section 106 ..." because it actually limits the ability of an alien to return to federal court for successive reviews, and keeps the judicial review process "unitary." *Hyun Joon Chung v. INS*, 720 F.2d 1471, 1474 (CA9 1983), *cert denied*, 467 U.S. 1216 (1984).

2. *The 1990 Amendments*

a. The circuits and the parties involved here disagree as to the meaning of the new paragraph (6) of INA 106(a), which states that "whenever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order." 8 U.S.C. 1105a(a)(6) (Supp. IV 1992). Petitioner respectfully disagrees with the INS's belief that this amendment

presupposes separately filed review petitions. (Br. 27) The second sentence of the amendment refers to the *seeking* of judicial review regarding a motion to reopen and reconsider, not the filing of a separate petition. The analysis given by the Court below is not helpful or persuasive. *Stone v. INS*, 13 F.3d at 938, Pet. App. A8. (Br. 27) The amendment requires the consolidation of *reviews*, which does not necessitate the filing of separate or distinct *petitions*. When an alien's motion to reopen is decided, one petition would be filed consolidating two reviews, the review of the original BIA order and the BIA action regarding the motion. [6] This interpretation is consistent

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[6] The eighth circuit holds that 8 U.S.C. 1105a(a)(6) supports neither the Petitioner's position nor the Respondent's view. *White v. INS*, 6 F.3d 1312, 1317 (CA8 1993) *cert denied*, ___ U.S. ___, No. 93-1411. The Solicitor General opposed

with the 1961 legislative background of section 106, which was concerned with multiple petitions in federal court.

b. The 1990 amendments contained legislative directives that the Attorney General should 1) limit the time period for filing motions to reopen and reconsider reconsider; 2) limit the number of such motions. Immigration Act of 1990, Pub. L. No. 101-649, sec. 545(d), 104 Stat. 5066. The time limits for filing judicial review petitions were also shortened. However, these developments strengthen the position of the Petitioner and the agreeing circuits. These proposed limits will nullify fears of an endless cycle of motions and reviews. They also will shorten any time gaps between a BIA deportation

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granting certiorari in *White*.

order and judicial review. [7]

C. The Court's Decision in *ICC v. Brotherhood of Locomotive Engineer's* is Consistent With Petitioner's View

As the INS points out, the statutes involved in *Locomotive Engineers* do not prevent petitions for reconsideration from rendering the underlying order nonfinal. (Br. 32-33) Also, a final ICC order is enforceable, notwithstanding the ICC's ability to reopen or reconsider that order.

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[7] The INS stated that the Attorney General's Report to Congress on Consolidation of Requests for Relief From Deportation is not germane to the issue of the time limit for judicial review. (Br. 30, n. 26) The Petitioner maintains that it is helpful to the Court. The Report acknowledges the disincentives to abusive conduct which are relevant to administrative litigation in general. The Report, for example, states that "the stringent requirements of 8 C.F.R. 3.2 and 3.8 (*relating to the BIA*)" largely eliminate abuses. (emphasis added) (Pet. Br. A11E-3)

49 U.S.C. 10327(i). Similarly, a deportation order is enforceable, notwithstanding the alien's or the Attorney General's ability to have it reconsidered.[8]

The INS points to some statutory differences between the INA and the Hobbs Act, as well as policy or "practical considerations," that require *Stone* to be distinguished from *Locomotive Engineers*. (Br. 35, 37). These issues have been treated in sections "A," and "B," and in Petitioner's brief. While the Attorney General may define "final," that definition is not undermined by permitting a non-citizen to complete a motion to reopen or

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[8] Two circuits have held that *Locomotive Engineers* does not control. *White v. INS*, 6 F.3d at 1314-1317; *Alleyne v. INS*, 879 F.2d at 1180-1182 & n.7. The courts did so, mostly, out of fears of abusive appeals. These concerns have been dealt with in this brief and the brief on the merits.

reconsider before petitioning for judicial review. Indeed, the interests of justice favor the approach that has been followed for nearly 30 years in our most alien populated circuit, and our other border circuits.

Respectfully submitted.

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